

NO. 46603-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

SAMUEL TROY BURRIS, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.13-1-01042-9

BRIEF OF RESPONDENT

Attorneys for Respondent:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

AARON T. BARTLETT, WSBA #39710
Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (360) 397-2261

TABLE OF CONTENTS

A.	ANSWERS TO ASSIGNMENTS OF ERROR.....	1
I.	THE TRIAL COURT DID NOT ERR WHEN IT PERMITTED THE VICTIM TO TESTIFY ABOUT THE IMPACT OF THE CRIME.	1
II.	THE PROSECUTOR DID NOT COMMIT MISCONDUCT DURING CLOSING ARGUMENT WHEN HE BRIEFLY DISCUSSED THE IMPACT OF THE CRIME ON THE VICTIM.....	1
III.	THE PROSECUTOR DID NOT COMMIT MISCONDUCT DURING CLOSING ARGUMENT BECAUSE HE DID NOT MISSTATE THE APPLICABLE LAW.	1
B.	STATEMENT OF THE CASE.....	1
I.	PROCEDURAL HISTORY	1
II.	STATEMENT OF FACTS.....	2
C.	ARGUMENT	7
I.	THE TRIAL COURT PROPERLY ALLOWED EVIDENCE OF THE IMPACT OF THE CRIME ON MS. MAYA BECAUSE THE EVIDENCE WAS RELEVANT AND ITS PROBATIVE VALUE WAS NOT SUBSTANTIALLY OUTWEIGHED BY THE DANGER OF UNFAIR PREJUDICE.....	7
a.	Admission of emotional impact evidence	7
b.	Probability the emotional impact evidence materially affected the outcome of the trial.	11
II.	THE STATE DID NOT COMMIT MISCONDUCT IN CLOSING ARGUMENT WHEN IT REFERRED TO PROPERLY ADMITTED EVIDENCE AND ACCURATELY STATED THE LAW.....	13
a.	Emotional impact argument	14
b.	Argument on consent.....	16
D.	CONCLUSION.....	19

TABLE OF AUTHORITIES

Cases

<i>State v. Aguirre</i> , 168 Wn.2d 350, 229 P.3d 669 (2010).....	8
<i>State v. Belgarde</i> , 110 Wn.2d 504, 755 P.2d 174 (1988)	13
<i>State v. Black</i> , 109 Wn.2d 336, 745 P.2d 12 (1987).....	9
<i>State v. Borboa</i> , 157 Wn.2d 108, 135 P.3d 469 (2006).....	8
<i>State v. Brown</i> , 132 Wn.2d 529, 940 P.2d 546 (1997)	13
<i>State v. Buttry</i> , 199 Wn.2d 228, 90 P.2d 1026 (1939)	18
<i>State v. Costich</i> , 152 Wn.2d 463, 98 P.3d 795 (2004).....	8
<i>State v. Davenport</i> , 100 Wn.2d 757, 675 P.2d 1213 (1984).....	13
<i>State v. Dhaliwal</i> , 150 Wn.2d 559, 79 P.2d 432 (2003)	13
<i>State v. Emery</i> , 174 Wn.2d 741, 278 P.3d 653 (2012).....	14
<i>State v. Fankhouser</i> , 133 Wn.App. 689, 138 P.3d 140 (2006)	8
<i>State v. Gentry</i> , 125 Wn.2d 570, 888 P.2d 1005 (1995).....	14
<i>State v. Grier</i> , 168 Wn.App 635, 278 P.3d 225 (2012)	8
<i>State v. Higgins</i> , 168 Wn.App 845, 278 P.3d 693 (2012).....	11, 12, 17, 18
<i>State v. Kirkman</i> , 159 Wn.2d 918, 155 P.3d 125 (2007)	13
<i>State v. Martin</i> , 169 Wn.App. 620, 281 P.3d 315 (2012).....	8
<i>State v. Russell</i> , 125 Wn.2d 24, 882 P.2d 747 (1994).....	14
<i>State v. Smith</i> , 104 Wn.2d 497, 707 P.2d 1306 (1985).....	13

A. ANSWERS TO ASSIGNMENTS OF ERROR

- I. **THE TRIAL COURT DID NOT ERR WHEN IT PERMITTED THE VICTIM TO TESTIFY ABOUT THE IMPACT OF THE CRIME.**
- II. **THE PROSECUTOR DID NOT COMMIT MISCONDUCT DURING CLOSING ARGUMENT WHEN HE BRIEFLY DISCUSSED THE IMPACT OF THE CRIME ON THE VICTIM.**
- III. **THE PROSECUTOR DID NOT COMMIT MISCONDUCT DURING CLOSING ARGUMENT BECAUSE HE DID NOT MISSTATE THE APPLICABLE LAW.**

B. STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Samuel Burris was charged by amended information with one count of Voyeurism (Domestic Violence) for an incident that happened on or between January 1, 2013, and April 5, 2013. CP 8-9. The case proceeded to trial before The Honorable Scott Collier, which commenced on May 5, 2014, and concluded on May 6, 2014, with the jury's verdict. RP 6-392.

The jury found Mr. Burris guilty as charged and the trial court sentenced him to a standard range sentence of six months. RP 390-91, 416; CP 40-41; 45-56. Mr. Burris filed a timely notice of appeal. CP 60-61.

II. STATEMENT OF FACTS

In December of 2012, Mr. Burris met Jennifer Maya through a friend. RP 194, 230, 292-93. The relationship soon became romantic and they began an exclusive dating relationship that resulted in the two moving in together. RP 194-96, 230, 293-94, 303. Ms. Maya was previously married, had four kids with her ex-husband, and kept in contact with him as the two remained close. RP 196-97, 256, 302-04. Mr. Burris attempted to limit the amount of contact Ms. Maya had with her ex-husband and this, combined with other controlling behavior, led to the deterioration of their relationship. RP 197-98, 256-58, 303.

On April 3, 2013, Mr. Burris sent a text message to Ms. Maya that contained two still images which were taken from a video of the two of them having sex in Ms. Maya's bedroom. RP 197-98, 206-10, 217, 258, 306-07. Ms. Maya testified that this message was how she learned that she had been filmed or photographed by Mr. Burris. RP 198, 210. Further, she testified that she had not consented to being filmed or photographed while the two were having sex and that Mr. Burris never asked for her consent. RP 198, 210.

Upon receiving the message, Ms. Maya was shocked and confronted Mr. Burris by calling him on the telephone and asking him

why he would videotape her. RP 207, 210, 307, 311. Ms. Maya testified that Mr. Burris explained to her that when “you’re with someone and you’re being videotaped, they act different, versus someone who is not being videotaped. And I wanted to catch you in the moment without you knowing you’re being videotaped.” RP 210-11. Additionally, Ms. Maya indicated that Mr. Burris told her that he knew she would have said he could not videotape or film her if he had asked for her consent. RP 211.

Mr. Burris’s testimony concerning the telephone call corroborated Ms. Maya’s, in that after he sent the text message with images to Ms. Maya he indicated that she was upset when she called him—about the pictures and their relationship as a whole—asked him why he had videotaped them having sex, and acted surprised about the images. RP 307, 311-12, 325. In addition, Mr. Burris’s testimony confirmed that he attempted to explain to her that he videotaped her the way he did because if he had held the camera in his hand she would have acted differently. RP 312-313. He also told Ms. Maya on the phone that he did not think it mattered that he did not tell her that he was videotaping. RP 312-313.

On April 4, 2013, the day after Mr. Burris sent the images, the couple had a public argument at a Buffalo Wild Wings restaurant. RP 198-99, 306, 259-260, 314-15. Mr. Burris showed up at the restaurant intoxicated, accused Ms. Maya of flirting with the man she was sitting

next to, swore at her, and requested that she come home with him. RP 199, 259-60, 314. Ms. Maya did not, however, leave the restaurant. RP 200, 314-15. As result, Mr. Burris sent her a number of insulting text messages that said, among other things, “You chose this. And you dirty slut. I hope you get AIDS and cancer. I do not love you anymore.” and “Come home. Whore. Whore. Slut. Slut. And Chingar.”. Ex. 2-9, RP 200-06, 315-17.

The next day, April 5, 2013, Ms. Maya called the police to report the sexual images that Mr. Burris had taken of her without her consent. RP 129-131, 217-18. When contacted by police, Mr. Burris told the officer that he should have gotten consent on the video. RP 174, 321, 327.

Mr. Burris testified that he had, with Ms. Maya’s knowledge and consent, taken many photographs of Ms. Maya in which she was nude or partially nude and had videotaped them having sex at least three other times. RP 294-98. In fact, Mr. Burris introduced several of these photographs into evidence at trial, though Ms. Maya denied that she consented to the photographs being taken. Ex. 17-21; RP 248-54, 294-98. With regard to the first three videos, Mr. Burris explained that on those occasions when the couple were having sex that he would stop, indicate that he was retrieving his phone, get up, grab his phone, turn on the camera, and film the encounter by holding the phone in his hand while

they continued to have sex. RP 298-300. Mr. Burris testified that did not ask Ms. Maya if he could record the sexual encounters, but that she did not say no and continued to have sex with him while he filmed. RP 300.

On the fourth occasion in which Mr. Burris reported filming the couple having sex, and the one that resulted in the images underlying the crime, he took a new approach. RP 301. This time he placed the phone on his dresser to capture them having sex. RP 301, 323. The new approach was necessary because Mr. Burris felt that when the phone came out during the three previous times that Ms. Maya did not act the same and he wanted this recording to be more natural. RP 300-01, 313, 325-25.

Mr. Burris explained that this occasion he and Ms. Maya were engaging in sex when he stepped away for a second, grabbed the phone, and placed it on the dresser. RP 301, 323, 328. Mr. Burris did not tell Ms. Maya that he was going to get his phone, that he was going to record them having sex, nor did he ask for her consent to do so. RP 302, 325. He also acknowledged that she did not indicate that she knew what he was doing, he could not tell if she knew he was recording, but, instead, he assumed she did. RP 302, 325, 327. The following exchange took place during his cross-examination:

Q. Okay. And you wanted that experience to be more natural?

A. Yes, I did.

Q. Okay. So it stands to reason then that you didn't want her having a camera in her face so that she would act naturally?

A. Yeah.

Q. Otherwise, it would defeat the purpose of what you're trying to accomplish, right?

A. Yeah. I thought that if she had the camera right there like I usually hold it, then she would not act as naturally.

Q. Okay. So if she knew that you're recording, she would kind of act differently?

A. Yeah.

Q. So she couldn't know that you were recording that day?

A. *She could have known.* I thought she knew. I mean, I wasn't trying to hide it or anything. I just thought that she was...

Q. So if the whole point was to record it so it was natural, correct?

A. Correct.

Q. And you indicated if she was aware of being recorded, that she would act unnatural, correct?

A. Correct.

Q. Okay. So -- and then you testified that you wanted to capture it.

So how was your goal accomplished if she's aware of it? I mean, your goal can only be accomplished if she's not aware of it, correct?

A. *Right. Well, yeah.* And part of it is -- is that my hands are free. You know, part of it is -- it's not as natural if you have to hold it with one hand and do the things that you do with sex when one hand is tied up holding a phone or a camera. So if I leave it setting over there, then it's much more natural, like when we usually do it.

Q. Okay. And that has to do with placement. What I'm asking you about -- isn't it true that you couldn't have accomplished your goals if she was aware of the filming?

A. No, I think it did. *I think that whether she knew or not was -- that's -- I don't think that it mattered.*

RP 324-327 (emphasis added).

Ultimately, Mr. Burris indicated that he decided to send the images to Ms. Maya because he could feel her pulling away and he wanted to remind her that they had something beautiful together. RP 306-07. According to Mr. Burris, however, the images upset Ms. Maya and she acted surprised at their existence. RP 311-12, 325.

C. **ARGUMENT**

I. **THE TRIAL COURT PROPERLY ALLOWED EVIDENCE OF THE IMPACT OF THE CRIME ON MS. MAYA BECAUSE THE EVIDENCE WAS RELEVANT AND ITS PROBATIVE VALUE WAS NOT SUBSTANTIALLY OUTWEIGHED BY THE DANGER OF UNFAIR PREJUDICE.**

a. Admission of emotional impact evidence

“Questions of relevancy and the admissibility of testimonial evidence are within the discretion of the trial court, and we review them

only for manifest abuse of discretion.” *State v. Aguirre*, 168 Wn.2d 350, 361, 229 P.3d 669 (2010); *State v. Martin*, 169 Wn.App. 620, 628, 281 P.3d 315 (2012) (“The admissibility of evidence is within the sound discretion of the trial court and an appellate court will not disturb that decision unless no reasonable person would adopt the trial court's view.”) (citations omitted). Moreover, a reviewing court can affirm the trial court’s evidentiary rulings “on any grounds the record and the law support.” *State v. Grier*, 168 Wn.App 635, 644, 278 P.3d 225 (2012) (citing *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004)). When a trial court’s ruling on such matters of evidence is in error, reversal will only be required “if there is a reasonable possibility that the testimony would have changed the outcome of trial.” *Aguirre*, 168 Wn.2d at 361 (citing *State v. Fankhouser*, 133 Wn.App. 689, 695, 138 P.3d 140 (2006)).

Evidence of witnesses’ emotional reaction to the crime or of the impact of the crime on witnesses can be properly presented to the jury. *State v. Borboa*, 157 Wn.2d 108, 122-23, 135 P.3d 469 (2006) (holding the prosecutor’s repeated questioning regarding the witnesses’ emotional reaction to the events and his description of the crime as horrible in closing argument were not improper). For example, the State may properly adduce “evidence of emotional or psychological trauma suffered by a complainant after an alleged rape” and the “jury is free to evaluate it as it

would any other evidence.” *State v. Black*, 109 Wn.2d 336, 349, 745 P.2d 12 (1987).

Here, the trial court properly allowed the State to ask the victim about how the crime impacted her. Specifically, the State asked Ms. Maya “[f]rom this experience, is there anything that stands out or that you can’t forget about it?”. RP 219. She answered:

I won't forget the feeling I felt, the betrayal, the vulnerability of being vulnerable and not knowing it.

I've -- I'm no longer confident in having a relationship with another individual, a man, because I've -- you know, I was married for a long time and I got with Sam and I didn't think that was possible.

I'm not going to risk having this happen again or have it being -- my kids involved. I'm just -- I'm not going to be involved with anybody else.

RP 219.

Upon the State asking the question the first time, Mr. Burris objected and argument was heard outside the presence of the jury. RP 212-17. The State argued that Ms. Maya’s response that the crime had an emotional impact on her was proof that 1) the crime occurred; 2) could rebut some of the defense’s claims such as consent; and 3) it was for jury to judge the genuineness, if any, of the impact. RP 213-214. Mr. Burris argued that Ms. Maya’s answer was irrelevant, inflammatory, and unduly prejudicial. RP 213-14. The trial court allowed the testimony likening Ms.

Maya's situation to that of a rape victim and noting that "a rape victim can usually give a little bit of testimony about how that made them feel" and stated that following Ms. Maya's answer the State could not go any further into that topic. RP 214-15.

Ms. Maya's feelings of betrayal and vulnerability, and those feelings in particular, make it more likely the filming or photography happened without her knowledge and consent, and in a place where she had a reasonable expectation of privacy—essential elements of the crime charged. The emotional trauma she suffered gained additional relevancy because Mr. Burris argued that Ms. Maya had previously consented to such filming or photographing and did so again on this occasion. Furthermore, there is little risk of unfair prejudice in admitting such evidence because Ms. Maya's feelings are those that one would expect a victim of voyeurism to experience. As a result, when combined with the brevity of Ms. Maya's testimony on the topic of the emotional impact of the crimes, admission of the evidence was unlikely to evoke jurors' sympathies to an appreciable degree more than the jury would have otherwise sympathized with her. Consequently, the trial judge did not abuse its discretion when it admitted the evidence.

- b. Probability the emotional impact evidence materially affected the outcome of the trial.

Assuming *arguendo* that the trial court erred in admitting the evidence, there is not a reasonable possibility that the testimony would have changed the outcome of trial because when Mr. Burris testified he all but confessed to the offense and corroborated Ms. Maya's testimony on key points regarding her knowledge and consent. Moreover, the jury was properly instructed to not decide the case based on sympathy, prejudice, or personal preference. CP 26.

The State had to prove beyond a reasonable doubt that the photographing or filming was without Ms. Maya's knowledge and consent. CP 35. The jury was instructed that "[c]onsent means that *at the time of the act* there are *actual words or conduct* indicating freely given agreement for *the act*." CP 32 (emphasis added). In determining whether there was consent the focus "is more properly on the victim's words and actions rather than [the defendant's] subjective assessment of what is being communicated." *State v. Higgins*, 168 Wn.App 845, 854, 278 P.3d 693 (2012) (citation omitted).

Mr. Burris testified, regarding images at issue, that 1) he did not ask for consent to film Ms. Maya while they had sex; 2) he did not tell her that he was going to be filming; 3) she did not indicate either way whether

she knew he was filming; 4) his goal of filming them “naturally” having sex would be defeated by her knowledge of the recording; and 5) when he sent her the images she was upset and seemed surprised by the existence of them. *See* RP 300-27. When Mr. Burris’s testimony is combined with Ms. Maya’s testimony that she had no knowledge she was being filmed, did not consent to the filming, would not have consented to the filming, that Mr. Burris told her that he knew this, that she was surprised and upset by the existence of the images when Mr. Burris sent them to her via text message, and that Mr. Burris explained to her that he “wanted to catch you in the moment without you knowing you’re being videotaped,” it becomes clear that Ms. Maya did not consent to being filmed irrespective of the emotional impact evidence.

This conclusion is buttressed by the fact that in determining whether Ms. Maya consented to the filming, the proper focus is on “victim's words and actions rather than [the defendant's] subjective assessment of what is being communicated.” *Higgins*, 168 Wn.App. at 845. Here, Mr. Burris essentially testified he could not point to any words or conduct indicating freely given agreement by Ms. Maya to be filmed, or even words or conduct indicating her knowledge of being filmed, and instead just assumed she had knowledge and consented. Thus, the jury would assuredly still have found that Ms. Maya did not consent to the

filming absent the emotional impact evidence and the introduction of said evidence did not have a reasonable probability of materially affecting the outcome of the trial.

II. **THE STATE DID NOT COMMIT MISCONDUCT IN CLOSING ARGUMENT WHEN IT REFERRED TO PROPERLY ADMITTED EVIDENCE AND ACCURATELY STATED THE LAW.**

At trial, “[c]ounsel are permitted latitude to argue the facts in evidence and reasonable inferences” in their closing arguments. *State v. Smith*, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985). Any allegedly improper statements by the State in closing arguments “should be viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions.” *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.2d 432 (2003) (citing *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)). Juries are presumed to follow jury instructions absent evidence to contrary. *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007) (citing *State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984)).

Prosecutors who in closing argument misstate the law of the case to the jury or who urge a guilty verdict on improper grounds commit misconduct. *State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984); *State v. Belgarde*, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988).

If the defendant can establish that prosecutorial misconduct occurred, then “the defendant must show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict. *State v. Emery*, 174 Wn.2d 741, 759-60, 278 P.3d 653 (2012). That said, a prosecutor’s “remarks even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective.” *State v. Gentry*, 125 Wn.2d 570, 643-44, 888 P.2d 1005 (1995) (citing *State v. Russell*, 125 Wn.2d 24, 85–86, 882 P.2d 747 (1994)).

Here, Mr. Burris argues that the trial prosecutor engaged in misconduct during closing argument when addressing the emotional impact of the crime on Ms. Maya and by misstating the law regarding consent.

a. Emotional impact argument

The trial prosecutor referenced the emotional impact of the crime on the victim two times, once during his initial closing and once during his rebuttal closing. He stated during his initial closing: “She talked about the impact it’s [the crime] had on her. Do you get that sort of impact if you

didn't go through this event? I would argue no." RP 359. During his rebuttal closing the trial prosecutor stated:

Defense depicts this as a photograph of her being consensually captured on film in an adult setting. I would propose a different interpretation. I would propose that this is something that you will never see again from Jennifer Maya. She will never sit there in a room topless with a significant other, comfortable. She will never again sit in a room and not question, What is somebody doing? What are they up to? She will never again sit in a room –

DEFENDANT: Objection. Counsel's attempting to inflame the jury. That's violation, Your Honor.

THE COURT: You're pushing the edge.

PROSECUTOR: I'm just making an argument as to the photo, Your Honor.

THE COURT: Let's move on.

PROSECUTOR: That's what I would argue that photo depicts. She testified the impact that this has had on her.

RP 385.

The first reference plainly referred to the emotional impact evidence for the reason it was admitted. The second reference may have been, as the trial court indicated, "pushing the edge," but it was a reasonable inference from Ms. Maya's testimony that she felt betrayed, vulnerable, and was not going to risk having this happen again. RP 385. Moreover, the argument was in direct response to Mr. Burris's argument as to what the photograph depicted. Realistically, the argument was very

unlikely to have had any persuasive effect on the jury given that they heard the judge comment that the argument was pushing the edge just before the judge asked the prosecutor to move on to another topic. When added to the fact that the jury was properly instructed to not decide the case based on sympathy, prejudice, or personal preference, and the strong evidence that Ms. Maya did not consent to the filming, the prosecutor's argument did not have substantial likelihood of affecting the jury's verdict. CP 26.

b. Argument on consent

Prior to the prosecutor's argument on consent that Mr. Burris claims was a misstatement of the law, Mr. Burris attempted at various points in his closing to explain what consent means and how to interpret the consent instruction, arguing that it meant "if Mr. Burris believed he had consent and it was reasonable to believe that, he has consent. That's it." RP 379-80, 363, 367, 369-70. In direct response to Mr. Burris's arguments on consent and his interpretation of the consent instruction, the prosecutor remarked:

Furthermore, the instruction specifically says consent means that at the time of the act, words or conduct indicating freely given agreement. At the time of the act. So you don't get to infer consent as it's defined in the law. And that is what governs your decision-making. Nowhere anywhere in there, in this instruction, is there a subjective component. It does not say consent is established if Mr.

Burris thought there was consent. It needs to be an affirmative act that Ms. Maya did indicating her involvement in this. She needs to do something, whether she says it verbally, or what have you, it needs to be an affirmative act, and it needs to be at the time of the act.

DEFENDANT: I'm going to object, Your Honor. It does not require an affirmative act in the instruction –

MR. VITASOVIC: That's a speaking objection, Your Honor.

MR. WALKER: The instruction speaks for itself.

THE COURT: Yes. Hang on for a second, Mr. -- once again, you have the instruction that I've provided to you on the consent, refer to that in your deliberations.

MR. VITASOVIC: I'll read it one more time. Consent means that at the time of the act, there are actual words or conduct indicating freely given agreement for the act. Consent, in this case, would have completely undermined Mr. Burris's intent. Because then, there would have been knowledge and then it wouldn't have been natural.

RP 381-82.

For one, following *Higgins*, Mr. Burris's interpretation of the consent instruction was erroneous as the proper focus is on "victim's words and actions rather than [the defendant's] subjective assessment of what is being communicated." 168 Wn.App. at 845. The prosecutor's argument that the consent instruction, which says "at the time of the act there are actual words or conduct indicating freely given agreement for the act," requires an "affirmative act" is not inconsistent with the words of the

instruction (one cannot use actual words or engage in conduct indicating freely given agreement if they are not engaging in some affirmative act), the law, or Mr. Burris's argument that Ms. Maya knew she was being filmed and continued to have sex (the affirmative act) with Mr. Burris after he grabbed the camera. Moreover, just as in *Higgins*, Mr. Burris was still able to tell the jury "that he reasonably understood his victim to say yes or, at least, he understood her not to object to his overtures by what she did and what she did not say and do. That was plausible jury argument given his characterization of their history. But the jury did not believe him. . . ." *Id.* at 855; RP 413.

Viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions, the prosecutor did not commit misconduct when arguing about how to interpret the consent instruction. Even if there was a misstatement of the law, however, "[t]he convincing effect of the evidence against the appellant, contributed to substantially by himself, independent of any argument on the part of the prosecuting attorney, clearly justified and manifestly brought about the verdict." *State v. Buttry*, 199 Wn.2d 228, 255, 90 P.2d 1026 (1939). In other words, even if the prosecutor's statements on consent constituted misconduct, said misconduct did not have a substantial likelihood of affecting the jury's verdict.

D. CONCLUSION

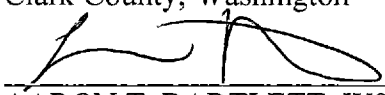
For the reasons argued above, Mr. Burris's conviction should be affirmed.

DATED this 27th day of February, 2015.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By:


AARON T. BARTLETT, WSBA #39710
Deputy Prosecuting Attorney